

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FOOD MACHINERY & CHEMICAL
CORPORATION, a Corporation,
operated as WESTVACO MINERAL
PRODUCTS DIVISION,

and

J. R. SIMPLOT COMPANY,
a Corporation,

Appellants.

vs.

W. S. MEADER and MAY MEADER,
husband and wife,

Appellees.

Nos. 17058
17059

Reply Brief of Appellants

Appeals from the United States District Court
for the District of Idaho, Eastern Division

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I.

STATEMENT OF THE CASE

Appellants in their statement of facts tried to present realistically the basic ultimate facts favorable to Appellees. Appellees merely state they are unable to agree with such factual statement, and we note they do not in a single instance point out to the Court where those facts are misstated.

Appellants, however, do not agree with certain statements in Appellees' brief, and we point them out specifically:

1. On Page 5 of Appellees' brief it is stated:

"The concentrations of fluorides on the Meader property showed as high as 300 ppm. on vegetation
* * *."

The record simply does not show any sampling of vegetation on the Meader property in the amount of 300 ppm fluoride.

2. Appellees, in discussing inversion, state on Page 44 of their brief:

"* * * The meteorologist stated that he was familiar with inversion, knew it existed in the area of the Meader Trout Farm and that he had seen smoke and smog that the inversion phenomena did affect on the Meader Trout properties."

In support of this they cite R. 1106-1107. The meteorologist did not testify that the Meader property or trout were in any way affected by inversion.

3. On Page 5 of their brief, Appellees say:

"* * * At page 325 of the record Dr. Gale stated directly that in excess of 3 ppm. fluoride would have an adverse effect on mature trout, whereas less than 3 ppm. would cause an abnormal growth and an adverse effect on younger trout. R. 325-326."

The record does not bear out the above statement. Dr. Gale did not say it would have an *adverse* effect on either mature or younger trout. Counsel for Appellees in his question used the word "effect" and it was answered in the affirmative by the witness without any statement or opinion whatever as to what the effect would be.

4. On Page 35 of Appellees' brief we find the following statement:

"* * * The effluents from the manufacturing plants of the Appellants were carried on the surface of the water to the same extent as they were carried over the surface of the land, and were deposited upon the surface of the water in precisely the same manner as they would be deposited upon the vegetation and real estate. The fish were in the water and were exposed to and stored the fluorine in their bodies over a long period of time as did vegetation."

The record gives no justification for this statement. Neither fish, nor animals, store fluoride in their bodies as does vegetation. There is proof of only one analysis of vegetation on the Meader property for fluoride content, R. 1010. The comparison of vegetation with running water is fallacious, otherwise the analytical results for the two would be comparable; and common knowledge, as well as the survey by the University of Idaho, Exhibits 25, 26 and 27, conclusively demonstrate this is not the fact.

II.

ARGUMENT

Appellees in their argument repeatedly refer to samples and concentrations (always using the plural) in the Meader waters as showing "up to 4.7 ppm F." The wording used seems to infer there were samples in excess of 3 ppm fluoride graduating up to 4.7 ppm. The facts concerning the analysis of *all* the different water samples taken from the Meader waters including those taken by Westvaco, Stanford Research In-

stitute, Dr. Greenwood and the University of Idaho will clarify this.

Of some 96 samples taken from the Meader waters and analyzed for fluoride content, one sample, in the year 1953, shows a result of 4.7 ppm fluoride. Not one other sample of the entire number taken showed a result as high as 3 ppm, the highest being a sample in a spring of 2.4 ppm. (R. 962, 1048) In the four-year period, 1953 through 1956, there is the one analysis of water at Meaders showing 4.7 ppm, and every other sample taken is well below 3 ppm. In the entire record only two samples show over 2 ppm, one for 4.7 ppm and the other for 2.4 ppm, and not a single other sample shows a content of 3 ppm. Water samples from Meaders analyzed for the years 1954, 1955 and 1956 show a fluoride content of less than 1 ppm, except in two instances of 1.1 ppm. (Exhibit 6, R. 33, Vol. I, 17058 and Exhibit 26.)

To avoid any uncertainty or confusion as to the proof of the fluoride content of the Meader Hatchery waters in the record for the years 1953 to 1956, inclusive, we pinpoint and copy the record. The following results are for parts per million fluoride:

WATER SAMPLES, 1953

		<i>No. of Samples Taken</i>	<i>PPM F. Range</i>	<i>PPM F. Average</i>
	<i>Location</i>			
10a	Meader Spring No. 1.....	12	0.4-0.8	0.64
10b	Meader Spring No. 2.....	12	0.5-4.7	1.03
10c	Meader Spring No. 3.....	12	0.6-0.8	0.67
10d	Meader Entry to Portneuf...	12	0.5-2.4	0.78

INDIVIDUAL WATER ANALYSIS FROM
MEADER'S TROUT HATCHERY

<i>Date</i>	<i>Hatchery Inlet</i>	<i>Hatchery Outlet</i>
3-22-54	0.9	0.6
5- 7-54	0.9	1.1
5-12-54	0.4	0.4
6-11-54	0.1	0.1
6-30-54	0.7	0.3
7- 8-54	0.3	0.3
7-23-54	0.3	0.3
8- 6-54	0.5	0.6
8-18-54	0.4	0.3
9- 7-54	0.6	0.6
9-17-54	0.3	0.1
2-14-55	0.5	0.6
3-14-55	0.5	0.5
4-11-55	0.5	0.5
6-13-55	0.5	0.5
7-18-55	0.5	0.5
5-18-56	0.5	0.5

Individual results for 1953 not available.

SAMPLES FROM POCA TELLO AREA

1955, 1956, 1957

UNIVERSITY OF IDAHO

<i>Sample Number</i>	<i>Sample Periods</i>		
	<i>First</i>	<i>Second</i>	<i>Third</i>
W-128	.3	.7
W-12	1.1	0.8	0.5
W-12	0.3		

WATER SAMPLES BY DR. GREENWOOD
9-29-55 and 10-10-55

<i>Type of Material</i>	<i>Location</i>	<i>Ppm F.</i>
Water	Runoff above rat pen	0.90
Water	Runoff on top of hill	0.52
Water	Blackfoot Pond runoff Northeast of Hatchery by Douglas Fence	0.86

Results above set forth are identified in the record as follows:

The analysis for 1953. (Exhibit 5, Table IX.)

Individual samples for 1954, Exhibit 6, under water samples more readily available. (R. 33, Vol. I, Case 17058.)

Individual samples for 1955, Exhibit 7, under water samples more readily available. (R. 33, Vol. I, Supra.)

Individual samples for 1956, Exhibit 8, under water samples more readily available. (R. 33, Vol. I, Supra.)

Individual samples by the University of Idaho for 1955, 1956 and 1957, Exhibits 25, 26 and 27, under water samples more readily available in Appendix to original brief of Appellants commencing on Page 83.

Individual samples by Dr. Greenwood, Exhibit 17. (R. 512.)

It will be observed there are actually 99 samples analyzed.

The figure, 4.7 ppm fluoride, stressed by Appellees, is found in 10b of the water samples for 1953, supra, which exhibit shows a range in the samples of 0.5 to 4.7 ppm flouride. This is an analysis of twelve samples, with an average of 1.03 ppm flouride. It is a mathematical impossibility for any other

one sample within the range to have exceeded 2.6 ppm. This is simply and easily calculated. The sum of 12 samples averaging 1.03 is 12.36. Subtracting 4.7 from 12.36 we have 7.66 for the remaining 11 samples. Assuming that 10 of those samples contained the minimum of 0.5, the total is 5.00. Subtracting 5.00 from the 7.66, 2.66 is the highest concentration possible. Of course, if more than one of the 11 remaining samples exceeded 0.5 ppm the second highest sample would be less than 2.66.

Appellees argue that one grass sample taken in 1951 on the Martin property, adjoining Meaders across the river on a bluff, proves the condition as to vegetation at Meaders from 1953 to 1956. Meaders is due north 1.8 miles from Westvaco as fixed by the University of Idaho.

What does the record show?

Exhibit 5 for the year 1953, page 17, gives the location of sampling sites. "Transect D" is due north of the Food Machinery & Chemical Corporation plant and the figures under "Sample Sites" are the miles from the plant. At this Transect, page 19, we find five samples taken 1.9 miles due north from May 21, 1953, to September 29, 1953, of alfalfa and sage, showing an average of 16.1 ppm fluoride.

In Exhibits 6, 7, 8 and 9 under the headings "Alfalfa & Sage" we find in "D Transect" the results and averages from samples taken due north of the plant at 2.0 or 2.1 miles. They are within the tolerance range levels for cattle.

On page 23 of their brief Appellees state:

"But, the fact is that Exhibit 18 shows that the viscera in the Meader trout analyzed during the years

covered by the lawsuit did contain 14 to 77 ppm. fluorine; and Dr. Gale testified positively that 3 ppm. reaching the cells would cause the damage as described by him. Thus, it is a fact established by the record that the Meader trout did in fact suffer from fluorosis, and direct positive testimony of this fact does exist contrary to any assertion made by Appellants."

This statement of Appellees is without foundation and is a direct attempt to misconstrue the same as proof of a continuous condition existing *during the years covered by the lawsuit*. The analysis shown in the exhibit was made in the year 1954 (R. 32, Vol. I, 17058) and given to Phil Meader by Dr. Wohlers. (R.570.)

Exhibit 18 shows that only three fish were analyzed from Crystal Springs and six from the Meader Hatchery. The viscera of only one fish from Crystal Springs was analyzed, a two-pound trout, which is comparable to a spawner at the Meader Hatchery. The analysis shows 2 ppm fluoride at Crystal Springs and 19 ppm fluoride at Meaders. The exhibit shows that with the exception of bone all of the fish was analyzed as tissue. The skin of the two-pound fish from Crystal Springs shows 229 ppm fluoride and of the spawner at Meaders 127 ppm fluoride. In addition, the two-pound fish from Crystal Springs shows the parts per million of fluorine to be twice that of a two-year fish at the Meader Hatchery. The analysis for the muscle of the two-pound fish from Crystal Springs shows 5 ppm as compared to 3 ppm of the spawner at Meaders. The whole of two fish from Crystal Springs shows 40 ppm and 73 ppm, respectively, and the whole of two fish at Meaders 113 ppm and 69 ppm, respectively. The bone analysis of the two-pound fish from

Crystal Springs is 825 ppm and the spawner at Meaders 725 ppm. Only seven analyses of three fish were made from Crystal Springs and 19 analyses of six fish from Meaders, and regardless of Appellees' statements, in six instances the results were higher at Crystal Springs than at Meaders.

Again, on Page 37 of Appellees' brief we find another positive statement with reference to Exhibit 18, which is as follows:

"The evidence is absolutely undisputed that the Meader trout did have in the viscera and tissues 14 to 77 ppm fluorine. This, when coupled with the direct and positive testimony of Dr. Gale, leaves little room for doubt as to the cause and effect of the fluorine emissions from the Appellants' plants upon the Meader trout and eggs. Appellants' witnesses at no time explained why trout outside the industrial area had only 2 ppm. fluoride in viscera as compared to 14-77 ppm. fluorine in Meader trout. *This conclusively shows excessive amounts of fluorine were reaching cells of the Meader trout.*"

The viscera of one trout at Crystal Springs showed 2 ppm and this is taken as a justification for the statement implying that other trout outside the industrial area were analyzed. Exhibit 18 was in Appellees' possession at all times when they were preparing for the filing of this suit, but Dr. Gale was not interrogated in any way with respect to the same.

The record is silent as to what amount of fluoride in the viscera of a fish would cause either chronic or acute fluorosis or would be damaging to trout eggs. This is the only proof that Appellees claim as direct, positive evidence of damage. It is not borne out by the record or the exhibit, and it is a gross

exaggeration to claim the exhibit is conclusive of excessive amounts of fluoride in Meaders' trout.

The only evidence in the record as to ppm fluoride in trout is found in Exhibits 17 and 18 and the testimony of Dr. Wohlers. (R. 1010.) Exhibit 17 is from samples taken by Meader, and Exhibit 18 by Stanford Research Institute. Adopting Appellees' argument, Appellants could well say that Exhibit 17, when compared with Exhibit 18, shows that the trout outside the industrial area had a higher fluoride content than at the Meader Hatchery because, in one instance, the analysis by Dr. Greenwood at Meaders shows less fluoride than an analysis of the whole fish from Crystal Springs. Of course, the fact remains that the few samples and analysis do not show in any instance a high fluoride content, and the record is still devoid of testimony that such fluoride content as was disclosed is in any way damaging to trout.

If the viscera of the trout analyzed by the expert Greenwood at Appellees' request showed conclusively the trout was suffering from fluorosis, it is strange he did not report it.

Appellees in their brief have limited themselves to only two possible instances which they contend establishes causal connection, namely Exhibit 18 and Dr. Gale's alleged tolerance levels of 3 ppm fluoride in contact with living cells and 4.5 ppm fluoride at a constant level in water (not flowing water), and one sample of water analysis of 4.7 ppm in the year 1953. We submit this evidence is completely insufficient to bridge the gap between cause and effect.

Appellants challenge Appellees to show any amount of fluoride in the Meader waters in excess of 1.1 ppm for the years 1954, 1955 and 1956, and challenge them to show a single

instance in the year 1953, except one, where there was any fluoride in the Meader waters in excess of 3 ppm. The entire gist of Dr. Gale's testimony goes to the proposition that fluoride being toxic, is harmful to a certain extent in any life. He did not even pretend to testify that fluoride of less than 3 ppm in contact with cell life, or that fluoride in a constant liquid solution of less than 4.5 to 20 ppm would cause any economic damage to trout. It is impossible to read into his testimony any statement or conclusion as to the amount of fluoride in running water necessary to cause death to trout daily, literally by the ton.

On Page 14 of Appellees' brief they make the following statement:

"Dr. Gale did testify that fish would be affected in water with a content of from .2 ppm to 1 ppm of fluoride, R. 287. That a small amount of fluorine in the bone is normal, R. 287, but if fluorine is in the tissues and viscera he would be worried about it."

The record, 287, shows the answer of the witness to be:

"There would be some effect just as the effect in people in fluoridation where we keep the parts per million down, it would be observable because they live in it."

Appellees' claim therefor is not supported by the record, and we submit the witness's answer cannot be construed as proof that the fish would be adversely effected or economically damaged. In connection with this testimony, Dr. Gale said on this point (R. 302.):

"No, no more than to say this: It is a fact that concentration in water supplies from seven-tenths to 1.5 or so, which is the normal water supply addition, does have

an effect, and is observed by every dentist and every person in the mottling of teeth, that is a fact, and the gradation of effect (200) up to lethal dose will be proportionate to the concentration of the flourine in the water."

On Page 319 of the record he said:

"Below, That's right, I will accept that, because if it's 3 parts below, there will be an effect, but it will be a tolerable effect, just like the mottling of teeth or the hardening of the enamel in the water supply."

It is immediately apparent that the witness, in referring to the matter, had in mind the fact that drinking water is frequently fluoridated and that up to a certain part per million is held by many to be beneficial.

At Page 15 of their brief, Appellees state that Dr. Gale had testified (R. 287) that if there was fluoride in the tissues and viscera he would be worried about it. This statement is simply not in the record at the designated page, nor any place else.

Again, Appellees adroitly contend that Dr. Gale fixed a different tolerance level for trout than did Appellants' experts and argue that on this conflicting evidence the jury was entitled to believe Dr. Gale. So the jury could, as to tolerance levels, but to what avail when there is not only a clear lack of proof that the trout were subjected to such levels, but positive proof that they were not.

The results of the analysis by the University of Idaho for the years 1955, 1956 and 1957 are of outstanding significance since they disclose the entire area to be free of water contamination by fluoride. Also, these samplings show the same

result and the same fluoride content in waters at Meaders as do those by Dr. Greenwood, Stanford Research Institute and Westvaco. The University made the survey for the express and only purpose of investigating the conditions in the area of Appellants' plants.

III.

DISCUSSION OF APPELLEES' CASES

Appellees are proceeding apparently upon the theory that it is not the proper function of this Court to examine the evidence adduced at the trial to determine whether that evidence is sufficient to sustain the verdict. However, we know that this Court will painstakingly comb the record, as to all favorable evidence of Appellees, together with the reasonable inferences to be drawn therefrom, to determine whether Appellees have in fact carried the necessary burden of proof. As we read the cases cited by Appellees on the principal questions involved in this appeal, we detect one basic thread which runs through all of the cases, that is, each one must be assayed and evaluated upon its own facts; and general principals, while an aid to such an evaluation, do not change the basic fact that each case stands or falls on its own.

Bearing this in mind, and recognizing the validity of the general principals set forth, we submit that in the following analyses of Appellees' cases each one can be distinguished from the case at bar so that they have no application to the particular facts. Because of the limited requirements of space in this Reply Brief, and since our opening brief adequately covers in our view all of the questions involved in this litigation, we limit our discussion of Appellees' cases to those cited in Appellees' Points I, II and III of their Argument.

A. The following cases in Appellees' brief are cited for their general proposition that the Court will not search the record for conflicting evidence and will not reverse where the evidence equally supports inconsistent inferences:

Sentilles v. Inter-Caribbean Shipping Corporation, 4 L. Ed. 2d 142, is the principal case relied upon by Appellees not only on this question but also on the question of the weight to be given expert testimony. Likewise, this case was the principal one relied upon by Appellees in resisting the Motion for New Trial and Motion for Judgment Notwithstanding Verdict. Because of Appellees' dependence on this case, we deemed it necessary to procure the record on that appeal, and we have it before us. We will quote from portions of that record, and we advise the court and counsel that the record will be available at the request of the court, or of counsel, at any time. This was a Jones Act case in which the Court of Appeals reversed the judgment for plaintiff seaman, reasoning that he had failed to negate all the potential factors that could have produced the aggravation of a pre-existing tubercular condition. On certiorari the United States Supreme Court reversed. Appellees seem to imply that this decision has abolished the requirement that they show a causal relation between the acts of Appellants and their damage and that the jury has the right to completely disregard expert testimony, no matter how far removed from the common and reasonable experience of ordinary men. The plaintiff seaman in the *Sentilles* case in his brief on writ of certiorari made the statement:

"It will be conceded, as stated in the Court of Appeal's majority opinion, that the petitioner, in submitting the items of damage relating to tuberculosis, was required to

prove that 'the aggravation of his tubercular condition was probably caused by the incident on shipboard.' "

The record in the *Sentilles* case discloses that there was direct, positive expert testimony from medical witnesses that the *probable* and precipitating cause of the aggravated tubercular condition was the traumatic injury sustained in the accident. There was conflicting evidence that the seaman's condition could be attributable to other diseases. We submit that in view of the circumstances the *Sentilles* case does not parallel the case at bar. Counsel cannot produce one scintilla of evidence in the record from the testimony of either laymen or experts that fluoride was the *probable* cause of the losses sustained by Appellees, or that it was a precipitating factor in the losses. In this case there was conflicting medical testimony, and the rule was followed that where reasonable men's minds differ their verdict will not be disturbed.

Fegles Const. Co. v. McLaughlin Const. Co., 205 F. 2d 637 (CCA 9). We have no quarrel with the quotation from this case, excepting only to say that it is inapplicable. The detailed evidence is not reviewed by the court, but the conclusion is reached that:

"The evidence here not only supports the inference that the fire was caused by hot rivets, but it attains a greater degree of certainty than demanded by the rule, as it excludes every other reasonable hypothesis." (P. 639)

E. K. Wood Lumber Co. v. Anderson, 81 F. 2d 161 (CCA 9).

The quoted portion of this case should be limited by the preceding sentence which is omitted and which bears out our statement that each case must be viewed in the light of its own facts:

“It is sufficient to say that the cases reveal no fixed and inflexible rule.”

B. Cited for Section II of their Argument that inferences from probative facts are not speculation if the inferences are probabilities by test of common judgment are the following cases:

National Lead Co. v. Schuft, 176 F. 2d 610 (CCA 8). There was competent, conflicting evidence in this case, and the theory of the defendant that the fire was caused by causes other than the negligence of the defendant was unsupported by proof and the appellate court merely resolved the conflict in favor of the trier of the facts.

Doctor's Hospital, Inc. v. Badgley, 156 F. 2d 569 (CCA, D.C.) was a simple negligence action involving the plaintiff slipping on an allegedly wet floor. There was ample and conflicting evidence as to the condition of the floor. The court indicated the jury could infer wet floors were easier to fall on than dry floors. How this case is authority for the complex problem of the effect of fluorides escapes us.

Newberry Co. v. Crandall, 171 F. 2d 281 (CCA 9). This was a simple negligence action involving slipping on a defective entrance way. While stating causation could be established by circumstantial evidence, the court stated that the inference of causal connection between the negligence and the injury “must be irresistible.”

Bratt v. Western Air Lines, Inc., 155 F. 2d 850 (CCA 10). A directed verdict for the defendant was reversed solely upon the ground that the trial court erred in not permitting a practical mechanic to testify as an expert. The Circuit Court reviewed the qualifications and stated the witness was qualified.

Wardrop v. City of Manhattan Beach, 326 P. 2d 15 (Cal.) is inapplicable since in that case a qualified medical witness testified to the reasonable medical possibility that the negligence of the defendant caused the injury to the plaintiff,

Kyle v. Swift & Co., 229 F. 2d 887 (CCA 4). A food poisoning case involved expert testimony establishing a reasonable inference that the contaminated product of the defendant was the cause of the plaintiff's illness.

Spolter v. Four-Wheel Brake Service Co., 222 P. 2d 307 (Cal.) involved expert testimony, and the record shows several experts testified the negligence of the defendant could have caused the wheel to come off the automobile and one witness testified such was the *only* cause. We note this qualification omitted from Appellees' quotation in this case, relating to the inferences which the jury may draw from circumstantial evidence:

"* * * This inference depends upon experience.

When this experience is of such in nature that it may be presumed to be within the common experience of all men with common education moving in the ordinary walks of life, there is no room for the evidence of opinion; it is for the jury to draw the inference."

C. Cited for the proposition that the jury determines the weight to be given to the testimony of experts and that they need not surrender their judgment to the opinions of scientific witnesses are:

Carscallen v. Coeur d'Alene & St. Joe Transportation Co., 98 P. 622 (Idaho), is cited for the proposition that experts' testimony may be disregarded if it runs counter to the conviction of the jury. The experts in this case testified as to the

proper manner of handling a boat, which we submit is not in the scientific category of the effect of fluoride on fish life. The court stated with respect to such evidence:

“* * * if it runs counter to their convictions of truth in the exercise of their own knowledge and judgment, they may disregard it entirely.”

Michalic v. Cleveland Tankers, 5 L. Ed. 2d 20, involved suit under the Jones Act by a seaman who claimed injuries from improper tools furnished by the employer. Judgment entered for defendant on directed verdict was affirmed in the Court of Appeals but was reversed in the United States Supreme Court by a divided court, five members holding a jury question was presented, with four justices dissenting. The sole question involved was whether the jaws of the wrench involved were worn and ineffective. While there is no direct testimony to such fact, the opinion discloses the plaintiff seaman testified that it was an old, beat up wrench, chewed up on the end, and that it slipped on every nut he tightened. There was evidence of infrequent inspection, that the tool was four or five years old and had a beaten and battered look. In addition to the quoted portion in Appellees' brief, the court stated, after reviewing the aforesaid evidence:

“* * * Plainly the jury, with reason, could infer that the colloquy between Michalic and the pumpman, and Michalic's testimony as to slipping, related to the function of the jaw of the wrench in gripping the nuts and that there was play in it which caused the wrench to slip off.”

Again, we do not think this decision controls the case ar bar since all it does state is that direct evidence of a fact is not required but circumstantial evidence is sufficient.

IV.

CONCLUSION

Appellees contend the circumstantial evidence (1) that Appellants emitted fluorine from their plants; (2) that vegetation samples in the general area show the existence of fluorides; (3) that the loss of fish and eggs was unusual after the plants commenced operation; (4) that the phenomenon known as inversion existed; (5) that after a storm leaves from trees fell in the pond; (6) that cellular life will be effected from a constant environment of 3 ppm fluoride and above—that these circumstances coupled with one out of ninety-nine water samples showing a fluorine content of 4.7 ppm in rapidly running water, constitute sufficient evidence from which the jury may infer a causal connection between the fluorine emissions from Appellants' plants and the losses in the Hatchery. Appellees further state that the jury was entitled to completely ignore the testimony of two scientists, both of whom stated fluorine had nothing to do with mortalities at the Hatchery, and was entitled to substitute their own judgment in a complex scientific manner for the judgment of such experts. We submit Appellees have failed to carry the burden of establishing, other than through conjecture and speculation, the causal connection between the Appellants' emissions of fluorides and the damage to the fish and eggs. We submit further that this case does not come within the rule that where matters are of common knowledge the jury may substitute its judgment and give no credence to the testimony of experts. The evidence of the Appellees, irrespective of whether it be circumstantial or direct, does not meet the test laid down by this Court in *Arvidson v. Reynolds Metal Company*, 236 F. 2d 244 (CCA 9), where this Court affirmed the trial judge, who stated:

“Plaintiffs have not sustained the burden of producing a preponderance of *credible evidence* to establish (a) fluorine content in the forage on their lands in amounts *above non-toxic limits*; (b) substantial fluorine content in forage attributable to effluents from defendant’s plants; or (c) that plaintiffs’ lands or cattle *sustained fluorine damage in particulars with reasonable or any certainty.*” *Arvidson v. Reynolds Metal Company*, 125 F. Supp. 481. (Emphasis ours.)

Respectfully submitted,

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